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No. 243

In the Supreme Court of the United States

OCTOBER TERM, 1957

KITTIEBELL G. MAJESIC, PETITIONER

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 8-11) is reported at 147 F. Supp. 737.

JURISDICTION

The judgment of the Court of Claims was entered on January 16, 1957. A motion for rehearing, timely filed, was denied on April 3, 1957 (R. 66). The petition for a writ of certiorari was filed on July 2, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims has jurisdiction to entertain a suit for back salary based on the alleged invalidity of a resignation from Government employment.

2. Whether a failure to exhaust administrative remedies bars a suit for back pay.

3. Whether a delay of over four and one-half years in bringing this suit constitutes laches.

STATEMENT

Petitioner, a former civilian employee of the Department of the Army, brings this suit for salary from the date of her resignation on March 9, 1951, to the date on which her petition was filed in the Court of Claims, November 21, 1955.

Petitioner was employed as a shorthand reporter at the Brooke Army Medical Center, Fort Sam Houston, Texas (R. 2). On February 27, 1951, she was notified in writing that it was proposed to effect her removal at the close of business on March 31, 1951, for "disloyalty to Brooke Army Medical Center, for wasting government time and money, for creating an adverse effect on morale of the personnel at this Center, and for inefficiency" (Def. Ex. A-6). There followed a ten-page specification of these charges (Def. Ex. A-6). The letter concluded by informing petitioner that she had a right to answer the charges personally and in writing, and to submit any other evidence she desired that would refute the charges (Def. Ex. A-6).

Instead of replying to the charges, petitioner chose, "upon professional advice", to resign, stating in her letter of resignation of March 9, 1951, that she "appreciate[d] the opportunity of having been in contact with a friendly and considerate staff at Brooke" and that she would "always remember the very many kindnesses extended me" (Def. Ex. A-5).

Over four and one-half years later, petitioner brought this suit in the Court of Claims for her salary from the date of her resignation, alleging that she had "resigned under duress" (R. 2). She further alleged that her superiors "wilfully, wickedly and maliciously spread false rumors" about her and addressed her in "foul and profane language"; that this so intimidated her that, when she was told that unless she resigned charges would be filed and sustained against her, she decided to accede to her superiors' request and resigned (R. 2).

The Government moved for summary judgment on the grounds of (1) failure to state a cause of action for illegal removal, (2) failure to exhaust administrative remedies, and (3) laches. The Court of Claims granted the Government's motion on the first two grounds without passing on the third (Pet. App. 8-11).

ARGUMENT

1. Instead of replying to the detailed charges preferred against her in the letter of February 27, 1951, petitioner resigned from her position. She now claims that her superiors spread false rumors about her and called her foul names, all of which

so intimidated her that she was in effect coerced into resigning rather than answering the charges. But apart from the fact that these allegations are belied by her letter of resignation, in which she stated that she was resigning "upon professional advice" and expressed appreciation of the "friendly and considerate staff at Brooke" and for "the very many kindnesses extended me" (*supra*, p. 3), the petition in the Court of Claims does not state a cause of action cognizable in that court.

Only the violation of a valid regulation or an Act of Congress can give petitioner a claim for back pay in the Court of Claims. This she appears to recognize, by basing her petition on the Lloyd-LaFollette Act[1] (Pet. 5-7). However, by resigning, she deliberately withdrew herself from the ambit of that Act. For that Act protects Government employees only in the case of "removal or suspension without pay". 5 U.S.C. 652. It has no application to resignations, as is obvious from the fact that the procedure it prescribes cannot be applied to a resignation.

The Court of Claims has long recognized that claims for back pay based on allegedly coerced resignations do not state a cause of action cognizable in that court. *O'Leary* v. *United States*, 77 C. Cls. 635, involved a situation strikingly similar to the instant case. There, as here, the plaintiff had resigned and was suing for back pay. The petition alleged that the resignation was secured through "evil in-

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[1] Act of August 24, 1912, Section 6, 37 Stat. 555, as amended, 5 U.S.C. 652.

fluence, persuasive argument, false promises and misrepresentations" (77 C.Cls. at 636). The Court of Claims held that it was "without authority to determine the validity of plaintiff's resignation" (77 C.Cls. at 638), and dismissed that count of the petition based on the allegedly invalid resignation.

2. Moreover, by choosing to resign rather than to answer the charges, petitioner has failed completely to invoke the elaborate administrative remedies which the Army had provided, remedies which go well beyond the statutory rights granted civil servants by the Lloyd-LaFollette Act.[2] Petitioner had only to pursue these administrative remedies to insure a full airing of the controversy in which she now seeks back pay. This administrative process, which was designed to protect an employee from dismissal on unfounded charges, began with the answer petitioner was invited to make in the letter of charges of February 27, 1951, and ended with a review by the Secretary of the Army.[3] If petitioner's answer had not been accepted as satisfactory, she could have had a review by the Commanding Officer of the installation at which she was employed.[4] At

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[2] Petitioner could also have requested an investigation by the Civil Service Commission for procedural irregularity. 5 C.F.R. 9.105.

[3] See Appendix C to CPR E2 (November 1948). (Def. Ex. D, p. 32).

[4] Army regulations in effect at the time provided that "An individual who has been separated involuntarily may, within 15 calendar days after receipt of notice of separation (see CPR S1), file a written request for review with the

her request, this review would have included a full-dress hearing at which she could have been represented by counsel, and could have presented oral as well as documentary evidence.[5] If the petitioner were not satisfied with the decision of the Commanding Officer, she would have had the right to request further review by successively higher echelons of the Army.[6] Having chosen to ignore this entire procedure which would have brought the matter to the attention of the appropriate officials, petitioner cannot now take her complaint to court. See *e.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Unit-*

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commanding officer of the installation under these regulations. . . ." CPR E2 (November 1948) Section 3-2.c. (Def. Ex. D, p. 18).

[5] Army regulations in effect at the time required a complainant to be advised of his or her right to a hearing (CPR E2 (November 1948), Section 6-1.a). (Def. Ex. D, p. 23), and required the Commanding Officer to refer the matter, upon request for a hearing, to a grievance committee (CPR E2 (November 1948), Section 5-3.b) (Def. Ex. D, p. 21). The regulations for conducting the hearing are set out in CPR E2 (November 1948), Section 6 (Def. Ex. D, pp. 23-25). The right to counsel and to present witnesses is provided for in Section 6-1.b (Def. Ex. D, p. 23). The decision of the Commanding Officer is made on the findings and recommendations of the grievance committee. Section 6-3.b (Def. Ex. D, p. 25).

[6] "When the employee is not satisfied with the decision of the commanding officer, he will have the right to request a review of the case by successively higher echelons of review, up to and including the Employee Grievance Board or the Fair Employment Officer, Department of the Army" (CPR E2 (November 1948), Section 7-1.a) (Def. Ex. D, p. 26). The Employee Grievance Board is the representative of the Secretary of the Army.

ed States v. *Sing Tuck*, 194 U.S. 161; *Heffernan* v. *United States*, 133 C. Cls. 839; *Martilla* v. *United States*, 118 C. Cls. 177. To allow the administrative process thus to be by-passed would impose a burdensome liability on the Government while at the same time denying it the opportunity of *in limine* investigating and correcting any impropriety which may have occurred.

3. Finally, petitioner's suit is barred by laches, inasmuch as she delayed over four and one-half years before filing her petition in the Court of Claims. The resignation of which petitioner complains occurred on March 9, 1951 (Def. Ex. A-5). Suit was not filed, however, until November 21, 1955 (R. 1). As a result of this delay, petitioner's claim, at the time her complaint was filed, totaled more than $20,000 (R. 1). In these circumstances, laches is an obvious bar to suit even if the claim were otherwise meritorious. The cases so holding are numerous.[7]

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[7] *Arant* v. *Lane*, 249 U.S. 367 (delay of almost two years); *Nicholas* v. *United States*, 257 U.S. 71, affirming 55 C. Cls. 188 (delay of over three years); *Norris* v. *United States*, 257 U.S. 77, affirming 55 C. Cls. 208 (delay of eleven months); *Zagurski* v. *United States*, 103 C. Cls. 755 (delay of three and one-half years); *Morse* v. *United States*, 59 C. Cls. 139, appeal dismissed, 270 U.S. 151, rehearing denied, 295 U.S. 768 (delay of thirteen months); *Stager* v. *United States*, 57 C. Cls. 116 (delay of nearly six years).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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